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THE BIG SKY

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Court rules against state in groundwater case

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HELENA — The state Department of Natural Resources and Conservation is reviewing water use requests in light of a judge's ruling that the agency failed to protect the water rights of property owners in the Four Corners area.

"We're analyzing the decision and seeing how it applies to the permits" the agency is reviewing, DNRC Director Mary Sexton said. She also said her department has made no decisions on whether to appeal the judge's ruling.

The decision — in a case in which three property owners sued the state agency for granting water permits to a private utility company — is the latest legal action in a long-standing fight

over development in the Four Corners area and its impacts on the Gallatin River and existing water rights holders.

"For a private system and a private subdivision to be considered a city or town, it really doesn't pass the straight face test," said Bozeman attorney Art Witlich, who represented the Four Corners property owners.

At issue is Montana's closed basin laws, which prohibit the state from issuing permits for new surface water appropriations in drainage basins considered fully appropriated or over-appropriated.

There are exemptions, such as in the Upper Missouri River Basin, which includes Gallatin County. The basin's rules exempt municipalities, although it has been pretty much left to the DNRC to determine what that means.

In 2005, the state agency adopted a rule defining municipal use as a water system servicing either a city or an un-

incorporated town and the areas immediately around them. A year later the agency rejected that rule as too strict, instead embracing, but not formally adopting, a definition that allows private entities to qualify for the municipal exemption if they will use water in the same way a city or a town would.

One of those entities is Utility Solutions, the private company that plans to provide water to several subdivisions in the Four Corners area. Utility Solutions claims that it should be considered as a municipal use and exempt from the closed-basin laws.

In challenging the DNRC's consideration to grant nine wells to that company, the Four Corners area property

owners said the utility's new wells will harm their existing water rights.

Those property owners also challenged the DNRC's definition of municipal use as too broad because it allows private developers to fall under the exemption.

Lewis and Clark County District Judge Dorothy McCarter agreed in her March 26 ruling, finding that the agency was circumventing the Legislature's intent to protect senior water rights holders in the Upper Missouri when it passed the closed basin laws.

"The exceptions to the closure must be interpreted narrowly to comply with legislative intent," McCarter wrote, adding that the DNRC's actions jeopardized the water rights of the three people who sued.

Witlich said development can still

occur in a closed basin and be consistent with the law, but that doesn't include a private water system claiming to be a municipality.

The ruling is the second time the courts have ruled against the DNRC to exemptions in closed basins.

Last year the Montana Supreme Court found that the agency didn't really address the connection between groundwater and surface water when issuing well permits in the Upper Missouri.

Previously, groundwater permits had been exempt unless the new wells could be shown to draw water directly from streams and rivers. The ruling greatly expanded what sources of water could fall under the closed basin laws.

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